In the Supreme Court of the United States

October Term, 1920.

SILVER KING COALITION MINES COMPANY, a Corporation,
Petitioner,
v.
CONKLING MINING COMPANY, a Corporation,
Respondent.

No. 158

On Writ of Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

Reply Brief of Petitioner

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REPLY BRIEF OF PETITIONER.

Petitioner has already on file in this cause, its "Brief in Support of the Petition for Writ of Certiorari" and "Additional Argument on Question of Boundaries of Conkling Claim, Lot 689." There is also before the court the briefs filed by the respective parties in the Circuit Court of Appeals. Nevertheless, we think it desirable to file a reply to our opponent's brief, entitled "Brief of Respondent," served on us December 20th. We will, however, confine our argument in this brief to the boundaries of the Conkling claim.

At the outset, we state a number of propositions, which, we think, will tend to make our position clearer, and embody in substance a brief of the argument.

BRIEF OF ARGUMENT.

I.

The 135.5 foot strip in controversy is claimed by petitioner under patent to the Custer No. 2 and Silver Hill No. 4 claims, issued to its grantor, the Belmont Mining Company. It is claimed by respondent under the Conkling patent issued for that claim to the Boss Mining Company, respondent's grantor.

II.

It is an admitted and established fact in the case that the Custer No. 2-Silver Hill No. 4 patent embraces the area of ground in controversy, by its terms, and it is not disputed that the area in controversy is also embraced in the monuments of the official survey for patent of these two claims.

III.

It is also admitted by respondent, in its amended bill of complaint, that these two claims were patented upon locations which antedated the location of the Conkling claim.

IV.

It is, in effect, admitted by the bill that the area of ground in dispute was the property of the petitioner's grantor at the time of the issuance of the patent for the Conkling claim.

V.

It is a fact admitted, that the Conkling patent antedates the patent to petitioner's two claims.

VI.

Since a valid location operates as a grant from the Government to the locator, the land included in the loca-

tion passes out of the jurisdiction of the Land Department, and can only be restored to its jurisdiction by some proceeding in personam or in rem, to which the locator is made party or which involves his location in whole or in part.

VII.

The title to a senior location may be lost or forfeited to an adjoining conflicting junior location only:

(a By abandonment;

(b) By forfeiture for failure to perform the annual labor required by law;

(c) By failure to file an adverse claim to an application for the junior location, based upon a survey which embraces the area in conflict with the senior claim.

VIII.

As a corollary to the foregoing proposition, petitioner contends that a patent for the junior location, which includes by its terms any part of the senior location, is void, unless it is proven affirmatively that the portion of the senior location included had been:

(a) Abandoned;

(b) Forfeited; or

(c) Waived in the proceedings instituted by the applicant for patent to the junior location.

IX.

Conceding that the ordinary rule is that the party asserting title under a junior patent has the burden of showing by what authority the department conveyed to him any ground confessedly granted by the terms of the senior patent, petitioner insists that that rule has no ap-

plication to the case at bar, in view of the admitted facts.

X.

Petitioner contends that the burden was upon the Conkling Mining Company at the trial to establish by a preponderance of the evidence:

(a) That the area in dispute had been waived by the owner of the Custer No. 2 and Silver Hill No. 4 locations;

(b) That the Conkling patent includes the area in dispute.

XI.

Petitioner contends that the only evidence which can possibly be regarded as supporting the theory that the area in dispute was waived in the patent proceedings for the Conkling, is the evidence afforded by the Conkling patent itself, which was the only evidence introduced by respondent and relied upon by it as establishing the boundaries of the Conkling claim; and this evidence consists alone in the calls of the Conkling patent for corner No. 3 and corner No. 4.

XII.

A patent to a neighboring junior location may by its terms call for monuments at such places as to afford evidence that in the patent survey of the junior location, upon which the patent is based, the monuments marking the boundaries were erected in such positions as to give the patented junior claim an area which embraces a portion of a prior unpatented neighboring location; or, the patent to the junior location may be so worded as to include no reference to or calls for monuments, and thus

to afford no evidence whatever of the monuments erected to mark the boundaries of the patent survey.

XIII.

Petitioner concedes that in the latter case above stated, the patent calls for distance are not evidence of the positions of the original monuments in the patent survey for the junior claim, but insists that in the absence of any competent evidence of the positions of such monuments, the patent is void so far as it embraces by its calls any part of the prior location; for, in such case, all that is made to appear is that the Land Department has granted a patent to land which had passed beyond its jurisdiction by a valid prior location thereof by one who, for all that appears, was a stranger to the subsequent patent proceedings for the acquisition of title to the junior location.

XIV.

If a patent to a junior location does contain a statement of the positions of the monuments set in the official survey of the junior location, upon which the patent is based, this statement is hearsay, and if available to the claimant under the patent, it is solely upon the theory that the statement has as its basis the official reports or field notes of the surveyor who surveyed the claim for patent, and that these reports or field notes afford competent evidence of the fact.

XV.

It is a corollary of the proposition last asserted that the field notes are better evidence than the patent, of the location of the survey monuments, and that the correct-

ness of the statements of the patent with respect to the position of these monuments may be tested by reference to the field notes.

XVI.

Petitioner contends that, since the burden was upon respondent to prove the positions of corners 3 and 4 of the Conkling claim in the official patent survey, in order to prove the extent of the area, if any, properly carved out by the Conkling patent from the admittedly prior senior location, Custer No. 2 and Silver Hill No. 4, respondent was not entitled to a decree which gave a title to the 135.5 foot strip, if, upon consideration of all the evidence, the original positions of the corners mentioned, as erected in the patent survey for the Conkling claim, were not established, by a preponderance of the evidence, in such positions as to embrace in the claim the whole of the 135.5 strip.

XVII.

If the calls of the Conkling patent for corner No. 3 and corner No. 4 be interpreted as calls for the monuments erected in the official survey of the claim to mark these corners—an interpretation rejected both by respondent and the Court of Appeals—these calls afford the only evidence given by respondent of the original positions of these monuments, or that the claim as surveyed for patent was fifteen hundred feet in length, Petitioner insists that this evidence afforded by the patent is completely annihilated by the Conkling field notes and the bearing trees scribed to perpetuate the evidence of the position of the northwest corner monument and post of the claim.

XVIII.

The general rule may be conceded to be as claimed by respondent, that where the original position of monuments actually called for in a conveyance as marking the termini of lines called for in the survey cannot be shown, the calls shall govern the boundaries, but petitioner insists that this rule has no application to this case, because the actual position of the monuments in the official survey of the Conkling claim must be shown by respondent with at least approximate accuracy, in order that it may carry the burden of proving the area of ground which should be carved out of the Custer No. 2-Silver Hill No. 4 patent, as having been forfeited to the Conkling claim *by virtue of having been included within the Conkling patent survey;* and for the respondent to assert that, in default of proof of the actual position of the westerly monuments in the official survey of its admittedly junior location, the patent calls shall govern, *when the evidence conclusively establishes that they are erroneous,* is equivalent to the assertion that it is entitled to the 135.5 foot strip, without regard to the survey monuments of the Conkling claim, which is again equivalent to the assertion that this strip of land was forfeited to the applicant for patent for the Conkling lode claim, although the boundaries of that claim, as officially surveyed for patent, may not have included any part of the strip in controversy.

XIX.

Petitioner contends that if the interpretation of the calls in the patent for corner No. 3 and corner No. 4, insisted upon by respondent itself and by the Court of Appeals, be accepted, namely, that these calls are not calls for monuments, it must then be admitted that the Conkling patent furnishes no evidence whatsoever of the positions of the monuments erected to mark these corners in the patent survey of the Conkling claim, and that, since respondent introduced no evidence upon this point except the patent, there was a complete failure of proof by respondent with respect to the westerly boundaries of the Conkling claim, and that, in such circumstances, it is futile to insist that the evidence offered by petitioner does not fix with definiteness or certainty the westerly end line of the Conkling claim.

XX.

In conclusion, petitioner insists that the evidence introduced upon its behalf at the trial established beyond controversy that the northwest corner (cor. No. 3) and the southwest corner (cor. No. 4) of the Conkling claim, as erected to mark the westerly end line of that claim at the time of the official patent survey thereof, were placed in the position shown upon petitioner's Exhibit B, whereby the 135.5 foot strip is demonstrated to be part and parcel of the Custer No. 2 and Silver Hill No. 4 claims, which were the property of petitioner's predecessors in interest, duly patented to them by virtue of their conceded ownership of these claims, and, therefore, the property of the petitioner, and that petitioner is exclu-

sively entitled to all the ore extracted from the area of ground in controversy.

ARGUMENT.

Although it is admitted in respondent's original and amended bill of complaint filed in the cause that "said Custer No. 2 and Silver Hill No. 4 lode mining claims, Survey No. 4850, were by letters patent, dated June 2, 1904, granted from the United States of America to the Belmont Mining Company; that such patent was based upon location notices antedating the location of said Conkling lode mining claim, and that said two claims were subsequently purchased by petitioner and were owned by it at the time of the extraction of the ore from the strip of ground in controversy in this case," respondent now suggests for the first time, in its last brief filed in this court, that it incidentally appears from certain evidence in the case that the *Silver Hill No. 4 claim* did not in fact antedate the location of the Conkling claim.

We insist, however, that the admission as contained in the bill of complaint, that both the claims in question went to patent upon locations which antedated the Conkling, is conclusive. In a New York case it is said:

> "Such admissions by the parties litigant are binding upon the court, and no countervailing evidence can properly be received, and if it is, either through inadvertence or by tacit consent, foisted into the case, it is entitled to no consideration."

Paige v. Willett, 38 N. Y. 28;
White v. Smith, 46 N. Y. 418.

A feeble effort is made by respondent to carry off the proposition that the admission does not imply that the said Custer No. 2 and Silver Hill No. 4 claims were *validly* located. There are two answers to this suggestion. One is that the language of the admission is that the patent to the claims was *based upon the locations admitted,* which conclusively assumes their validity. Second, when any fact is admitted in a pleading, every other fact which may be legitimately and naturally inferred from the admitted fact is likewise admitted. See:

Connecticut Hospital v. Town of Bridgewater, 60 Conn. 1, 36 Atl. 1017.

See also:

Balloch v. Hooper, 146 U. S. (L. ed.) 1008;

Kansas & A. V. Ry. Co. v. Morton, 61 Fed. 814;

Central R. R. of N. J. v. Stoermer, 51 Fed. 518.

The Custer No. 2 claim, the prior location of which is still conceded, embraces practically the entire portion of the 135.5-foot strip in controversy, and the area from which the greater part of the ore was extracted. The fact is stated by complainant in its original bill, as follows:

> "That as patented said Custer No. 2 and Silver Hill No. 4 lode mining claims overlapped and included a large area of said Conkling lode mining claim *as patented* and described in the patent thereof, and herein, including within the said overlapping all of the area of said Conkling lode mining claim included within the southwest 135.5-foot strip thereof, except only a small area at the north-

> west corner of said Conkling lode mining claim as herein described, and particularly included within said overlap all that portion of said 135.5-foot strip where the said ore was discovered and contained as aforesaid."

Our contention is that the jurisdiction of the Land Department extends only to the right to convey the ground which is embraced within the official monuments of the patent survey. So far as the patent includes any neighboring ground not within the survey, we insist it is void, whether the neighboring ground has been appropriated by a location antedating the location upon which the patent is based, or whether such neighboring ground at the time of the patent is still the property of the government. We call attention to a Pennsylvania case upon this question, and quote from the opinion of Kennedy, J.:

> "It is clear, however, that the extent of the plaintiff's claim under the patent, if the boundaries called for in it be different from the survey as made upon the ground and returned by the deputy surveyor into the office, must be regulated and decided by the latter. The officers of the Land Office are not the proprietors of the lands granted by them, that they can grant them without regard to quantity or price. The lands belong to the state; and the land officers act only as the agents of the state in disposing of them, and are limited in their action by the authority granted to them in this behalf. So that if they grant lands belonging to the state in a manner not authorized by law, the grant must be considered void. They cannot give a patent for a tract or lot of land without first having the quantity conveyed in it ascertained by a survey or a measurement thereof.

> "It is indisputable that a survey should be made for the purpose of ascertaining the quantity before a patent shall be issued; and being made to that end, it follows, as a necessary corollary, that in making out the patent, the courses, distances and calls of the survey ought to be strictly observed and made the boundaries of the grant contained in the patent. And whenever it happens, from mistake or otherwise, that this is not the case, the patent must be corrected and reformed by the survey, and made to correspond with it as to quantity and boundary. Hence if, in the present case, the patent, under which the plaintiff claims, includes land not embraced within the survey, it must be considered void for the excess."
>
> Kelly v. Graham, 9 Watts (Pa.) 116.

The case at bar is not one in which it is affirmed, either expressly or inferentially, by complainant, that the 135.5-foot strip (the area in controversy) was, at the date of the Conkling patent, the property of the United States, and was then granted to complainant or its predecessor in interest. The complainant, we insist, does not in the bill tender such an issue. The averments of the bill are, in substance, that a patent was granted by the government of the United States for the Conkling mining claim to the Boss Mining Company, the predecessor in interest of complainant; that this patent by its calls embraces the area in controversy, but that the Custer No. 2 and Silver Hill No. 4 were locations which antedated the location of the Conkling claim and went to patent upon such prior locations, although the patent was subsequent in date to the Conkling patent, and that the strip of ground in controversy, 135.5 feet in width, was embraced in said two

prior locations, and was, accordingly, included within the United States patent granted upon said claims.

Petitioner insists that if a valid location of a mining claim is in effect a grant from the government of the United States, the averments thus made disclose no title in complainant to the 135.5-foot strip. On the contrary, these averments in effect show title in the defendant.

Complainant in its amended bill then proceeds to set up title to three-fourths of the area in controversy by various allegations, which it is not necessary to quote, to the effect that after the defendant in the bill (petitioner) had made a discovery of certain ore bodies in the Conkling claim near the westerly portion thereof, it purchased the Custer No. 2 and Silver Hill No. 4 claims from the Belmont Mining Company, without the knowledge of respondent and without inviting it to join in such purchase. The complainant avers in the bill that the purchase thus made by the defendant ought to inure to complainant's benefit since the parties were at that time tenants in common of the Conkling lode mining claim, and said claim *by its patent calls* embraces said 135.5-foot strip; and the complainant offers to do equity by paying its share of the price paid by defendant for said Custer No. 2 and Silver Hill No. 4 claims. It is further averred in the bill that the defendant ought not to be allowed to vary the boundaries of the Conkling lode mining claim from those stated in the Conkling patent, *because of the equitable consideration attempted to be pleaded,* and complainant expressly declares as follows:

"And your orator further shows and alleges that

> none of the original marks or boundaries of said Conkling lode mining claim referred to in said patent are now standing; that the original place where the respective corners were marked, *if marked at all*, is now only a matter of speculation."

(See original bill, paragraph XVIII.)

We insist that the complainant's bill is not susceptible of the construction that a recovery for the ore extracted from the area in controversy is sought upon the theory that, while this controverted area was embraced in the two locations which antedated the location of the Conkling claim, it is the property of the complainant, Conkling Mining Company, because it was included in the monuments erected to mark the boundaries of complainant's claim, when officially surveyed, whereby the Land Department acquired jurisdiction to embrace such area within the Conkling patent. We submit that nothing of the kind is hinted at in the bill.

There is in the patent to the Custer No. 2 and Silver Hill No. 4 claims, an exclusion of certain ground in favor of the Conkling claim, but the ground excluded is only so much of the two claims as lies easterly of a line drawn between posts 3 and 4 of the Conkling claim as they were erected upon the ground at the time of the patent survey thereof. *This excluded area is shown, and its boundaries platted upon the petitioner's map Exhibit B, and, as there shown, it will be observed that the area excluded to the Conkling lies entirely easterly of a line drawn between posts 3 and 4, as actually found upon the ground in the po-*

sitions which petitioner claims they were placed at the time of the official survey of the Conkling claim. Hence it is evident that the Land Department, when it came to issue a patent for the Custer No. 2 and Silver Hill No. 4 locations disregarded the calls of the Conkling patent for the length of that claim, and confined its boundaries within the limits marked out upon the ground in the patent survey.

Under the averments of the bill and the denials of the answer, petitioner contends that the burden of proof was clearly upon the Conkling Mining Company to prove its ownership in the 135.5-foot strip. It seems to us clear beyond controversy that such proof could only be made by evidence *that the Conkling mining claim, when surveyed for patent, was so marked out upon the ground that its westerly monuments brought within the claim the area in controversy.* The task which complainant set for itself at the trial was to take this 135.5-foot strip out of the Custer No. 2 and Silver Hill No. 4, and import it into the Conkling claim, notwithstanding the admitted fact that the Conkling claim was of junior location.

The complainant offered no evidence of its ownership of the 135.5-foot strip except the Conkling patent, coupled with the stipulated fact that the easterly corners of the claim were not in dispute and were correctly laid down on petitioner's map, Exhibit B. It then appeared, of course, that if the calls in the Conkling patent were correct, it embraced the 135.5-foot strip. Complainant then rested, having entirely abandoned the theory of title asserted in the bill.

It may be interesting to pause here a moment and inquire whether complainant thus made out even a prima facie case of title to the area in controversy. We insist that this question may be answered in the affirmative only if it be supposed that in the case of two contiguous valid lode mining claims, one a senior and the other a junior location, the production of a prior patent to the junior location, which by its terms embraces a portion of the senior location, casts upon the owner of the latter the burden of proving that he had not forfeited his location, and did not upon the application for the patent, waive his right to the part embraced in the patent. It seems to us that the burden of proof is thus placed upon the wrong party, even if the patent contains any statement which tends to prove that the monuments erected to mark the patented claim at the time of its official survey were so placed as to include within it the area of the senior claim in controversy. Even under such circumstances it would appear that the burden would be upon the patentee to prove the forfeiture or waiver of the included portion of the senior location,—that is to say, that the area in controversy was in fact included in the official patent survey.

Having introduced the patent in evidence, the complainant then deprived it of all evidentiary value by insisting, in effect, that it did not call for monuments at corners 3 and 4 of the claim. The position of complainant was that the calls of the patent were conclusive of its boundaries, irrespective of the monuments, and this is the contention which has been sustained by the learned

Court of Appeals. If for the moment, for the sake of argument, it should be accepted, it follows that by complainant's interpretation of its own evidence it offered no proof whatever of the original location of either corner No. 3 or corner No. 4 of the Conkling lode mining claim. If the burden of proof of complainant's ownership in the 135.5-foot strip, in view of the averments of the bill of complaint, was upon complainant, we submit that it entirely failed to maintain such burden (if its own interpretation of its patent is correct), unless the Land Department may lawfully include in the patent to a junior location, a portion of an adjoining senior location not shown to have been included within the official monuments erected to mark the claim patented at the time of the official survey thereof. To assert this proposition to be true is equivalent to the statement that the owner of an adjoining senior location may lose a portion—the greater part, or even the whole of it—to an adjoining junior location, without notice even of the pendency of an application for patent for the latter claim. What thus becomes of the provisions of the statute obviously designed for the benefit of the owners of adjacent unpatented locations, requiring an official survey of the claim for which patent is sought, the marking of its boundaries by permanent monuments, which shall be tied, wherever practicable, to adjacent bearing trees;—the requirement that notice shall be posted within the four corners of the claim for which patent is sought, and in the Land Office, and published in a newspaper published in the vicinity; and that owners of adjoining claims shall file protest and adverse claim

within sixty days for any portion of their claim which, per chance, may be included within the official monuments erected on the ground for which patent is sought, under penalty of being deemed to have waived any such conflict area in the event of failure to file such adverse claim? Is it true that all these provisions may be disregarded, and that the owner of an adjoining senior location may lose a part of it, although there are no monuments ever erected to mark the boundaries of an adjoining junior location for which patent is sought, although no notice is ever posted upon such claim, and no such notice ever published, if a patent to such junior location should issue, the calls of which embrace part of the senior location?

The respondent, at the trial, actually relied upon the jurisdiction of the Land Department in the issuance of a patent to ignore the rights of the owner of an adjoining senior location, and made no attempt whatever to prove that the rights of the owners of the Custer No. 2 and Silver Hill No. 4, senior locations, had been forfeited or waived, so as to justify the inclusion of the area in controversy in the Conkling patent.

The respondent, Conkling Mining Company, is in this dilemma: If it denies, as it always has done, that the Conkling patent calls for monuments at corners 3 and 4 of the claim, it is logically compelled to admit that it introduced upon the trial no evidence of the position of these monuments; if it admits, as it never has done, that the calls of the patent do call for monuments at these corners, then it must concede, what it always denied, that evidence was admissible to establish their original posi-

tions. We insist that the patent does call for monuments, and that, as a matter of law, these monuments limit the calls for course and distance, and we insist that not only was evidence admissible to prove the original position of these monuments in the patent survey of the Conkling claim, but that such evidence should have been produced by the Conkling Mining Company to maintain the burden of proof which the law cast upon it, and that it failed to produce any such proof if, as held by the learned Court of Appeals, the patent embodies no call for monuments. It is contrary to all precedent that a plaintiff, suing for the possession of land or for the value of the minerals extracted from it, having once admitted that the land was the property of the defendant in the case, should be allowed to make out a prima facie title to it by the production of a deed or patent for it, without proof that upon the execution thereof the land was the property of the grantor in the patent or that he had authority to convey it. What the Conkling Mining Company did was to introduce a patent from its grantor, and, admitting the ground in controversy was once the property of the defendant, called upon it to prove that it had never forfeited its rights, and never by any means authorized the confiscation thereof by the government and the grant thereof to the patentee in the Conkling patent.

Where two patents have been issued by the government, each covering the same land, if the plaintiff claims under the senior patent, the burden is ordinarily upon the grantee in the junior patent, if he would hold the land in controversy, to prove a defect in the government's title

which disabled it from including the land in the senior patent. It may be true that if both parties claim under the government, the senior patent, if by *its terms it embraces the land in controversy,* and purports to convey only the claim as surveyed for patent, establishes a prima facie title. In such case if the junior patentee wishes to contend that the patent does not embrace the land in controversy, the burden is upon him to prove that contention. Under such circumstances, the patent may be not only evidence of what it conveys, *but evidence of the right of the government to make the conveyance;* but, where it is admtited by the claimant under the senior patent that it embraces land which, prior to the issuance of such patent, had passed from the government by valid location to the grantee in the junior patent, it is evident that the introduction of the senior patent in evidence, however clearly it may purport to convey the land in dispute, is no proof of title of the grantee therein, if it contains no evidence that it is based upon the official survey. It does not devolve upon the owner of the junior patent under said circumstances in order to sustain his claim to the land, equally included in his own patent, to prove that he had not forfeited, waived or otherwise parted with his right to the land in controversy before the execution of the senior patent. We do not take the time to cite authorities to this proposition, because, we insist, that it is so plainly correct that no citation of authority is needed to make it acceptable.

Under these circumstances, petitioner proceeded with its evidence, and when it attempted to show the ori-

ginal location of posts 3 and 4 of the Conkling claim, it was met by the objection that no evidence of any character, however competent in its nature to prove the fact asserted, was admissible for the purpose of establishing that the patent from the government to the Belmont Mining Company, the predecessor in interest of the petitioner in the ownership of the Custer No. 2 and Silver Hill No. 4 claims, properly included the 135.5 foot strip in controversy;—that no proof was admissible that post number 3 and post number 4, marking, respectively, the northwesterly and southwesterly corner of the Conkling, stood but 1364.5 feet from the respective easterly corners of said claim. These objections of respondent were overruled, and the evidence was received.

Our opponents insist that the learned trial judge erred in admitting the field notes in evidence, but the objection to the field notes was not upon the ground that they were *incompetent*, in the sense that they were not the fit and appropriate method of proving the facts to which they relate, *but that no evidence of any character was receivable to prove the location of said corners.* The objections of respondent went equally to the oral testimony of the living witnesses who were produced to prove the facts in question. (See Transcript of Record, pp. 82-83; No. 3977.) As we interpret the decision of the Circuit Court of Appeals, its holding that the field notes were inadmissible is placed upon the very ground upon which the objection was made.

The competency of the field notes, however, if any evidence be admissible to prove the position of corners

numbers 3 and 4, seems upon authority to be beyond question.

Daly v. Fountain, 35 Ala. 26;
Morrison v. Neff, 18 Neb. 133, 24 N. W. 555;
Smith v. Forrest, 49 N. H. 230;
Hunt v. Johnson, 19 N. Y. 279;
Dugger v. McKeson, 10 N. C. 1, 6 S. E. 746;
Poor v. Joyce, 12 Tex. 440;
Moore v. Stewart, 7 S. W. 771;
Stanus v. Smith, 8 Tex. Civ. App. 685, 30 S. W. 262;
Heffington v. White, 4 Ky. (1 Bibb) 115;
Carland v. Roland, 6 Ky. (3 Bibb) 125;
Steele v. Taylor, 13 Am. Dec. 151;
Rowland v. McGowan, 20 Ore. 538, 26 Pac. 853.

See also our "Additional Argument on Questions of Boundaries of Conkling Claim, Lot 689," pp. 23, 24, 25, citing:

Foss v. Johnstone, 158 Cal. 119, 128;
3 Lindley on Mines, Sec. 778, pp. 1894-5;
Grand Central Mg. Co. v. Mammoth Mg. Co., 36 Utah 364, 378-9;
Resurrection Gold Mg. Co. v. Fortune Gold Mg. Co., 129 Fed. 668.

Lawful rules and regulations prescribed by the several departments of the government have the force of law. See authorities cited in our "Additional Argument on Questions of Boundaries of Conkling Claim, Lot 689," p. 33.

On page 32 of the brief last referred to, as well as in our original brief in support of the writ, at pages 28-29, we quote from Exhibit TT-1 the rules of the General Land Office governing deputy mineral surveyors, which were in force at the time of the survey of the Conkling claim. These rules in effect provide how the artificial monuments or posts erected to mark the boundaries of mining claims being officially surveyed shall be marked, and make particular provision for the marking also of trees or other permanent nearby objects, and require that the field notes of the survey shall not only describe the marks scribed upon the artificial monuments erected to mark the corners, but shall describe the permanent objects which have been marked as bearing trees to such corners and the marks upon such trees. These field notes are required to be returned to the office of the Surveyor General, and become a part of the permanent records of the Government. The object of their preservation is to perpetuate the record evidence of the original official positions of the corners of all mining claims which have been officially surveyed for patent. The whole object of keeping these records would be frustrated if, when a controversy arises, the courts should refuse to receive them in evidence. We insist that they are admissible upon elementary principles. The statements in the field notes are, in a sense, hearsay; but they come under a well known exception to the hearsay rule, being memoranda made in the course of the performance of official duties.

3 Wigmore on Evidence, Sec. 1665.

As a practical fact it would be difficult to imagine a more satisfactory method of proving the original position of an artificial monument erected to mark the corner of a claim than by resorting to the neighborhood of the claim, finding the bearing trees, if any, which had been marked by the official surveyor for the particular corner, and then referring to his original notes of the survey to ascertain the relation of the corner to these bearing trees. To close the door to such evidence is voluntarily to grope in the dark when light is obtainable. When we have found bearing trees marked as described in the field notes, and read there the distance and course of these trees from a given corner, we will seldom be at a loss to fix its location with reasonable accuracy.

In the Conkling field notes, which were introduced in evidence by petitioner, the statement is made that "around each post is placed a mound of stones." These field notes also disclose the fact that the official surveyor marked *two trees* as witness or bearing trees to the northwest corner, post No. 3, of this claim, one a red pine and the other a balsam, both, according to the field notes, marked "U. S. 689 P. 3 B T." According to the rules, these trees are required to be "adjacent" to the corner and to be also "in opposite directions as nearly as may be" from the corner. That these bearing trees were found upon the ground is not disputed. It is not disputed that each is marked in the manner stated in the field notes; and post No. 3 of the claim, as shown on petitioner's Exhibit B, stands within 3 or 4 feet of a line drawn between these trees. *It is idle to suggest that these are*

not the bearing trees marked for the northwest corner of the Conkling claim. That claim is United States Lot 689, and there is no other claim in existence of that designation. These trees are marked "U. S. 689 P. 3 B T." That means, if it means anything, that they are marked as bearing trees to post 3 of the Conkling claim. The red pine tree, as we find it actually growing in the ground, is approximately 22 feet, and the balsam tree 26.9 feet, from post No. 3, the northwest corner of the Conkling, as platted upon petitioner's map Exhibit B. Post No. 3, at the northwest corner of the Conkling claim, as it was officially surveyed for patent, is shown upon this exhibit almost at the exact distance and upon almost the exact course called for in the field notes of the claim from the bearing trees to that corner.

There is no room for the intimation that these bearing trees were recently marked. The testimony shows that they were found marked as called for in the field notes long before this controversy arose and before the area of ground in controversy was known to have any value. In addition to these facts we direct attention to the testimony of Mr. Walter H. Wiley, who cut out a section of the pine tree and produced it at the trial as Exhibit "P." The witness called attention to the surveyor's "blaze" on the exhibit, and the growth which has since occurred, saying, "and the annual rings shown at the end of the block show how long ago it was blazed. Counting these rings on the end of the block from the middle out to the edge of the bark there can be counted about twenty annual rings, showing that this "blaze" was made at least

that number of years ago." (Tr. Rec. Case 3977, p. 90.)

The Conkling claim was surveyed in 1889. In 1897, Mr. J. Fewson Smith, while making a survey of the Arctic claim, found the northwest corner of the Conkling, to which he tied post No. 3 of the Arctic, placing it on the line between posts 3 and 4 of the Conkling as he then found them. There is no room to doubt that Mr. Smith found the northwest corner of the Conkling claim at the identical point at which it is platted upon petitioner's Exhibit B. This is proved by the fact that the Arctic claim surveyed by Mr. Smith is platted upon Exhibit B, and as there platted the distance and course from *its* post No. 3 to post No. 3 of the Conkling is exactly as given in the field notes of the Arctic claim, and is shown on the line between posts 3 and 4 (Conkling). Mr. Smith testified that he returned to the northwest corner of the Conkling in 1909 (twelve years after his first visit), and at that time he found post No. 3 of the Arctic *still in position*, and saw again the northwest corner of the Conkling claim, post 3, *in the mound of stones where he had first seen it in 1897*. (Trans. p. 89.) This is rather contradictory of the instability of posts and monuments suggested by respondent's counsel.

In our two former briefs we have called attention to the testimony of Mr. Gorlinski, who, when surveying for patent the Custer No. 2 and Silver Hill No. 4 and other claims in 1902, was at the northwest corner of the Conkling claim and saw the mound of stones, and the old post lying down beside it marked as described in the field notes of the Conkling. The evidence shows clearly that we have

upon petitioner's Exhibit B placed the northwest corner of the Conkling claim in the identical position in which these two last witnesses testify they saw it, and respondent does not contend the contrary.

We wish to direct more specific attention to some evidence which we think has not been adequately emphasized, namely, that which has reference to the westerly corners of the Pirate King claim, and particularly to its northwesterly corner, as established from its bearing trees. To facilitate the labor of the Court in following the argument on this point, we include as a "supplement" to this brief 2 small plats marked "figure 1—Petitioner's reply brief," and "figure 2—Petitioner's reply brief."

By the field notes of the Conkling we discover that its northerly side line is coincident with the south side line of the Pirate King claim, which was surveyed by Adolph Jessen before he surveyed the Conkling. The field notes of the latter claim contain the specific statement that the surveyor, in running the north side line of the Conkling, ran west along the southerly side line of the Pirate King to post No. 3, the southwest corner of the latter claim. We quote from the Conkling field notes the call from the northeast corner of the claim to its northwest corner:

> "Thence S. 60 deg. 45 min. W. along southeasterly side line of Lot 580, Pirate King lode, and northwesterly side line of this claim, 1500 feet (to) P. 3 of L. 580, Pirate King lode, and northwesterly corner of this claim. * * *"

(See Exhibit O, Case No. 3977.)

Here, then, is a plain statement that the southwesterly corner of the Pirate King (P. 3) is identical with the northwesterly corner of the Conkling. As further proof that this is a common corner, we call attention to the testimony of Mr. Gorlinski that when he was at the northwest corner of the Conkling claim, in the fall of 1901, he found a bearing tree marked as described both in the Conkling and the Pirate King field notes. He testified that it was scribed as a bearing tree both to the *southwest corner of the Pirate King and the northwest corner of the Conkling*. By comparison of the field notes for each of these claims, it will be seen that Mr. Jessen gives the courses and distance of this bearing tree from said two corners as identical.

(See Exhibit O and Exhibit M, Case 3977, Conkling and Pirate King field notes.)

Upon petitioner's map, Exhibit B, the southwest corner of the Pirate King is platted as identical with the northwest corner of the Conkling. The proper location of this northwest corner conclusively fixes the original boundaries of the Conkling claim, and if it is to be placed in the position claimed for it by petitioner and as platted upon its map Exhibit B, the 135.5-foot strip is confessedly no part of the Conkling claim. There is no dispute respecting the easterly end line of the Pirate King claim. There is no dispute with respect to the south boundary line of that claim, except as to its length. As described in the patent, it is 1500 feet in length, and as laid down on our Exhibit B, it is 129 feet shorter.

The field notes of the Pirate King were offered in evidence. They contain a call for two bearing trees at the northwest corner, post No. 4, of the claim. We quote from the Pirate King field notes:

> "From post No. 4, a balsam pine 9 inches in diameter bears south 74 deg. 30 min. west *5* feet distant, and a balsam pine 12 inches in diameter bears south 25 deg. 45 min east *20* feet distant, both marked 'U. S. 580, P. 4, B. T.'"

The northwest corner of the Pirate King claim, post No. 4 is platted upon petitioner's Exhibit B in proper relation, according to the field notes, to these two bearing trees. As there platted the post is substantially 5 feet from the first mentioned tree, and exactly 20 feet from the tree secondly mentioned, and substantially upon the course given in the Pirate King field notes. Mr. Brooks testified, and his testimony was undisputed, *that he found these trees and the northwest* corner stake of the Pirate King claim properly marked standing in a mound of stones. This witness testified:

> "On September 2, 1908, I found an old quaking asp in mound of stones very much rotted but with marks still visible. These were 'U. S. 192 P. 3, U. S. 580, P. 4.' There was one post marking both corners, and also there was another post marked for Lot 580, a newer post. The bearing trees were bearing trees to Lot 580 that I found." (Tr. p. 80—top.)

On cross-examination by Mr. Critchlow in reference to the same corner, the witness testified as follows:

> "In drawing this map, Exhibit B, I placed the west end line of the Nero not according to the field notes of that claim, but according to the field notes of other claims. I did that because I had the southwest corner of the Hope *with the bearing trees of the Pirate King.* • • • My bearing trees were the bearing trees called for by the Pirate King field notes."

(Pr. Rec. Tr. 3977, p. 85.)

Counsel complain that Mr. Brooks did not explain "how closely, if at all, the bearing tree fitted the description in the field notes." Mr. Brooks said the bearing trees he found were those called for by the Pirate King field notes. This statement of Mr. Brooks was equivalent to saying that they were trees of the kind and marked as described in the Pirate King field notes. The testimony of the witness upon this point was wholly unchallenged. His testimony upon this point, when under cross-examination by respondent's counsel, was evidently sufficiently full and explicit to be entirely aceptable by them and by the learned chancellor who heard it. We submit that this is rather a late hour to complain of it.

Mr. Brooks explained, and the field notes of the Pirate King show, that the southwest corner, post 3, of the Nero lode, Lot 192, and the northwesterly corner of the Pirate King, post 4, are at the same point, which accounts for the fact that the post which he found as marking the northwest corner of the Pirate King was also marked "U. S. 192, P. 3."

The following is from the field notes of the Pirate King, commencing at the southwest corner, post 3:

> "Thence N. 12 deg. 40 min. W., along southwesterly end line of claim, * * * 200 feet to P. 3 of Lot 192, Nero lode, and northwesterly corner of this claim, both on line, said latter corner (P. L. 3, 192, Nero lode) being a post firmly set, mark same 'U. S. 580, P. 4,' for Post No. 4."

This makes it clear beyond reasonable doubt, we submit, that whether the southwest corner of the Nero claim is properly placed upon petitioner's Exhibit B or not, it is indisputably placed at a point where a monument marked for that corner was found in 1882, when the Hope was surveyed, and again in 1888, when the Pirate King was surveyed for patent; and that the Pirate King northwest corner was then erected in the same position as the southwest corner of the Nero as found on the ground; and that this Pirate King corner was then tied to the two bearing trees above mentioned.

Counsel for respondent call attention to the fact that Mr. Brooks' testimony shows that he found the post marking this southwest corner of the Nero and northwest corner of the Pirate King claim as long as twenty years after the survey of these claims, but we can perceive no significance favorable to respondent in this lapse of time. The fact that the post was found in position twenty years after the time when it was erected and marked is a tribute to the endurance of such monuments, and repels respondent's intimations that there is something of a "migratory nature" in posts set up in mounds

of stones to mark the boundaries of mining claims, and that wherever you find them, there is ground to suspect that they are not in their original position, especially when found many years after the date when they were first marked and erected.

If counsel in 1912, when this case was tried, four years after the time of the discovery of the post in question by Mr. Brooks, doubted his testimony, it would have been very simple for them to have sent a witness up to the property to see if there was any evidence of a mound of stones and any bearing trees at the northwest corner of the Pirate King where Mr. Brooks said he had found them, at which time the witness could have discovered whether the bearing trees were marked as Mr. Brooks stated, as called for in the Pirate King field notes. It is a fair inference that if counsel did not take the trouble to verify Mr. Brooks' testimony in respect to the northwest corner of the Pirate King claim, they had no doubt of the truth of it. They never attempted to dispute it.

The patent call between post 3 (S. W. cor.) and post 4 (N. W. cor.) of the Pirate King is north 12 deg.40 min. west 200 feet, and this line drawn between these posts as platted on petitioner's Exhibit B, is north 12 deg. 20 min. 30 sec. west 195.6 feet.

Mr. Robert Gorlinski testified as follows:

> "I went to the northwest corner of the Conkling, where I found post 3. I then found at the northwest corner of the Conkling, a post firmly set in

> the ground, marked 'U. S. 580 P. 3,' and lying down right by the side of it a post marked 'U. S. 689-3.' • • • The one that was standing was U. S. 580 P. 3. It was standing in a mound of stones. The other was lying on the ground by the side of it. It was marked 'U. S. 689 P. 3.'" (Pr. Rec. 3977, p. 93.)

It is not disputed that the position in which Mr. Gorlinski found this southwest corner post of the Pirate King lode was at the point where it is platted on our map Exhibit B in correct relation to the southwest cor. post 2 of the Custer, to which Mr. Gorlinski tied the Conkling post, when he surveyed the former claim. Mr. Gorlinski found the northwest corner of the Conkling claim by surveying a line upon the course and for the distance called for in the Conkling field notes from the southwest corner of the claim, as found and fixed by Mr. Brooks when making his survey of the Twentieth Century claim, in August, 1901. (Pr. Trans. No. 3977, pp. 92-93.)

Our opponents insist that the Nero claim is not properly laid down on petitioner's Exhibit B. The basis for this assertion is the statement in the field notes of the Nero that its northwesterly corner is but 33 feet from the southwesterly corner (No. 3) of the Boss; whereas on Exhibit B the northwesterly corner of the Nero is placed 168.5 feet easterly from the Boss corner. But the *same surveyor* who surveyed the Nero also surveyed the Hope,—Mr. Joseph Gorlinski.

In making the latter survey, Mr. Joseph Gorlinski, in the field notes of the Hope, makes the statement that its

easterly end line is for a distance the same as the westerly end line of the Nero. Counsel say this is in conflict with the statement in the field notes of the Nero in respect to its northwest corner. This is true; but it is evident that Mr. Joseph Gorlinski, who did not survey the Boss, was misled, when surveying the Nero, in respect to the Boss corner. He could not be mistaken as to the northwest corner of the Nero claim, for this he erected himself, but he might well have been mistaken as to the southwest corner of the Boss.

Mr. Brooks testified that he did not plat the westerly end line of the Nero on Exhibit B from any posts or monuments found on the ground; that he found none that he could identify and established the end line of the Nero from its connection given in the patent survey of the Brave Columbia claim. (Tr. pp. 78-79; Case 3977.) If Mr. Joseph Gorlinski saw a post, which he took to be the southwest corner of the Boss, that was 33 feet from the monument which he erected to mark the northwest corner of the Nero claim, it was short of the distance called for in the Boss patent. But the statement as to the distance from the southwest corner of the Boss to the northwest corner of the Nero, of course, is not conclusive of the position of the *northwest* corner of the latter claim. Both the *northwest* and *southwest* corners of the Nero were marked by monuments erected by Mr. Joseph Gorlinski himself. Now, when he surveyed the Hope, he could not have determined that its easterly end line was the same as the westerly end line of the Nero, *unless he found the monuments which he had previously erected to*

mark the westerly boundaries of the latter claim. His statements in the field notes of the Hope show that he did find these westerly posts of the Nero. It was only by finding the westerly corners of the Nero that he was able to determine the point, which he gives in the field notes of the Hope, where the easterly end line intersects the westerly end line of the Nero claim. (See Tr. Rec. No. 3977, p. 81.)

Our friends do not dispute that the Hope claim is correctly platted on our map, Exhibit B, and as there shown its easterly end line is practically coincident with the westerly end line of the Nero. The easterly end line of the Hope, as shown in our brief in support of the application for the writ, is established beyond controversy by the Hope shaft and the Hope discovery point, and the testimony of the witness R. H. Brown. (Tr. 3977, p. 95.)

As corroborative of the statement in the Hope field notes as to the westerly end line of the Nero claim, we have the testimony of Mr. Brooks that while making a survey of the Missouri lode, Lot 272, in July, 1882, he found post No. 2 of the Nero, which is its northwest corner; and he says that on November 3, 1910, he found again the post lying on the ground in the vicinity of its original location.

Our friends, dissecting this testimony of Mr. Brooks, intimate that he does not here clearly refer to the northwest corner of the Nero in the position in which we claim it, but when we consider the context it is evident that they are mistaken.

We quote from the record. Mr. Brooks said:

> "On July 29, 1882, I was engaged in making a survey of the Missouri lode, Lot 232, and at that time I found a post of the Nero. I found post No. 2 of the Nero at the time I made that survey. I do not think I have seen it *standing* since that time. I found it lying upon the ground in that vicinity in the *neighborhood of the corner* on November 3, 1910." (Pr. Rec. Case 3977, p. 79.)

Mr. Brooks made the map, Exhibit B. He was giving his testimony with reference to the *corner* of the Nero as he had marked the *corner* upon the map. Nowhere in his testimony does he refer to any "corner" of the Nero, except as he platted it on Exhibit B. Immediately after giving the testimony quoted, he testified that "on September 2, 1908, I found an old quaking asp in a mound of stones, very much rotted, but with marks still visible. These were 'U. S. 192, P. 3,' 'U. S. 580, P. 4.' There was one post marking both corners." (Pr. Tr. Rec. No. 3977, pp. 79-80.)

This old quaking asp, marked as stated, Mr. Brooks plats upon Exhibit B as the southwest corner of the Nero claim. The patent call in the Nero for the westerly end line of this claim (between posts 2 and 3) is south 12 deg. 40 min. east 200 feet, *to corner No. 3, a "quakenasp" post marked "U. S. 192, P. 3," which is its position as shown upon petitioner's map, Exhibit B.*

Now, in addition to the statement of Mr. Joseph Gorlinski, in his field notes of the Hope, as to the westerly end line of the Nero, and Mr. Brooks' testimony in respect to the posts actually found in the ground, we have the statement of Mr. Jessen in his field notes of the Pirate

King, that the northwest corner of the latter claim is identical with the southwest corner of the Nero. (Quoted *supra.*) Mr. Brooks' testimony as to the finding of the post marked for both claims, corroborates the field notes.

No one testifies that he ever found any monument or post marking the westerly end line of the Nero at any point westerly of the position called for upon our map Exhibit B. The evidence of the field notes, that the northwest corner of the Pirate King is identical with the southwest corner of the Nero, cannot be satisfied by assuming the southwest corner of the latter claim to be farther west than shown upon petitioner's Exhibit B, because *the field notes of the Pirate King tie its northwest corner* (post No. 4) *to two bearing trees.*

The *northwest* corner of the Pirate King is platted upon the map, Exhibit B, not only with reference to the *southwest* corner of the Nero claim, but in correct relation to these two bearing trees. As already pointed out, Mr. Brooks found these bearing trees, called for in the Pirate King field notes, in the position shown upon Exhibit B.

The whole purpose of the testimony elicited to fix the westerly boundaries of the Nero, particularly the southwest corner, post No. 3, was to enable us to determine correctly the northwest corner of the Pirate King, and thereby test the reliability of the testimony of the witnesses who say they found the southwest corner of the Pirate King (identical with the northwest corner of the Conkling) at a point which is shown upon Exhibit B to be 1364.5 feet from the northeasterly corner of the

Conkling claim. The Conkling is not tied by its field notes to the Nero, but to the Pirate King claim; and the northwest corner of the Pirate King is in turn tied to the southwest corner of the Nero. The northwest corner of the Pirate King, however, is definitely and forever fixed, as platted upon petitioner's Exhibit B, by the bearing trees called for at that corner, one of which is but 5 feet distant from the northwest corner post No. 4 of the Pirate King.

The evidence of Mr. Brooks, which fixes the southwest corner of the Nero, strengthens our contention as to the northwest corner of the Pirate King; but the bearing trees for that corner so indisputably fix it that the true location of the southwest corner of the Nero is of negligible importance.

We submit that petitioner's evidence is absolutely conclusive of the true position of the northwest corner of the Pirate King claim, and that when we bear in mind that the patent call from that corner southeasterly takes us within less than 5 feet of the position which petitioner claims is the original position of the southwest corner of the Pirate King, the latter corner is as firmly established as the former. There is no escape from the conclusion that the testimony of Mr. Brooks and of Mr. Robert Gorlinski, that they found a post properly scribed, according to the field notes, as post 3 of the Pirate King claim, in the position shown upon petitioner's map, Exhibit B, is true; and the conclusion is equally inescapable that the post there found was in its original position.

The respondent's own witness, Frank Anderson, testified that he found *at the northwest corner of the Conkling* "a sawed pine stake 11½ inches by 3½ inches, in a small mound, marked and scribed 'U. S. 580, p. 3.' It was standing in this small mound of stones. • • •"

Mr. Anderson also testified that "the Pirate King field notes call for one bearing tree at that corner, or post 3. That bearing tree is one of the bearing trees called for in the Conkling field notes. • • • I found two bearing trees marked in the way described in the field notes of the Conkling, and one of these is also marked as a bearing tree for the Pirate King." (Pr. Tr. of Rec. No. 3977, pp. 156-157.)

The bearing tree referred to by Mr. Anderson is the balsam. It was first utilized and marked by Mr. Jessen when he surveyed the Pirate King claim. Later he also marked it as bearing tree to the northwest corner of the Conkling, each time referring to this tree as of the same distance and upon the same course from the respective posts of the Pirate King and the Conkling,—28 feet. At this common corner of the two claims we find two mounds of stones side by side, and here we find, according to the undisputed testimony, two posts, one properly scribed for the southwest corner of the Pirate King, and the other for the northwest corner of the Conkling,—one standing in its mound of stones, and the other lying down.

Our opponents will not have it that these posts—these mounds of stones—mark the northwest corner of

the Conkling and the southwest corner of the Pirate King, but, struggle against it as they may, it is in vain to contend the contrary. It is true that the post scribed for the Pirate King corner is not a *four by four* pine post; but the statement in the field notes of the claim that this corner is marked by such a post is coupled with the statement that the post is marked as the witnesses found it to be marked, and as said in the Resurrection case:

> "The distinguishing characteristics of the posts described by the surveyor in his field notes were not the material of which it was made, its length or its size. They were * * * especially the marks he put upon it, for the express purpose of identifying it, and of setting it apart from all others."
>
> Resurrection Gold Mg. Co. v. Fortune Gold Mg. Co., 129 Fed. 668.

It is true that, if we take the *courses and distances* of the bearing trees called for in the Conkling field notes, they are not entirely consistent with the contention that post No. 3 of the Conkling originally stood in the position in which petitioner places it upon its Exhibit B. But it would be entirely unreasonable to permit all the other evidence to be overthrown by the statement in the Conkling field notes that the balsam tree is south 4 deg. 15 min. east from post 3, and the pine tree 35 feet distant. These statements are obviously incorrect. They are proved so by the further statement in the field notes of the Conkling that post No. 3, northwest corner, is upon the southerly side line, and identical with post 3 (S. W. cor.), of the

Pirate King, and that the balsam tree is distant 28 feet from the post.

We are justified in rejecting the course from the balsame tree and the distance from the pine tree to the post, because the evidence we have just reviewed indisputably stablishes the position of the southwest corner of the Pirate King, as identical with corner No. 3, northwest corner of the Conkling.

That the repugnant elements of a description may be rejected, see:

Parker v. Kane, 22 How. (U. S.) 1;
Deery v. Cray, 10 Wall. (U. S.) 263;
Dodge v. Wallen, 22 Cal. 224.

See also:

4 Amer. & Eng. Enc. of Law, title "Boundaries," p. 779.

That we have properly ascertained the position of the corner is evident enough from the fact that, as platted upon our Exhibit B, it is 26.9 feet from the balsam, while the call in the field notes is but 28 feet, a difference merely negligible, and it is significant, too, that the course given from the post 3 (N. W. cor. Conkling) to the pine tree is out but a negligible distance; if we start from the pine tree upon the course given to the northwest corner of the Conkling we will, when we have traveled 22 feet, "stump our toe" upon a mound of stones which the surveyor placed around the post marking that corner. As we have platted it, the post itself stands within a foot and a half of the course of the line mentioned; and if we proceed

farther on that course we never come again to a mound of stones or a post, or any place where a mound of stones or post was ever seen. And so, if we ignore the distance from the balsam to the post, as given in the field notes, and travel from the balsam upon the course given, we never come to any point where there was ever a post or mound of stones marking the corner of any claim.

Perhaps it will be suggested that it is somewhat singular that Mr. Jessen twice erred in giving the course to the balsam tree, first with reference to the Pirate King, southwest corner, and then again with reference to the northwest corner of the Conkling; but it is highly probable that when surveying the Conkling Mr. Jessen relied upon the course which he had previously noted in the Pirate King field notes. Experienced surveyors in discovering errors in course made so long ago, have no difficulty in accounting for them. In the first place, the course is very easily deflected a few degrees by the steel tape, or the axe carried by the surveyor himself, or by his assistants, which may be near when the compass is read; and again many instruments twenty-five or thirty years ago were not corrected for the magnetic variation, and after the course was taken the surveyor would add or subtract the magnetic variation, accordingly as the angle might be found in the first, second, third or fourth quadrant. It not infrequently happened that he would add the magnetic variation when he ought to subtract it, and vice versa. This probably accounts for the great error in course from the balsam to the post in question. The mag-

netic variation was 17 deg. 20 min. east. The angle being in the third quadrant, the variation should have been added, but being subtracted, a course which should have been southwest from the post to the tree was made *southeast*. Allowing for slight disturbance of the needle, when it was read in taking the course to the balsam, if the magnetic variation had been added, as it should have been, the course would have been substantially as it is found to be from the post as platted in petitioner's Exhibit B.

It is matters of this kind which enforce the wisdom of the rule which induces appellate courts to rely upon the finding of the trial judge upon the facts, unless he is clearly shown to be in error. He is, in a sense, a juror of the vicinage. Very often he is personally acquainted with those whose work he reviews. In the instant case, the learned trial judge was perhaps familiar with these mountains, with the difficulties which beset the surveyor, with their methods and with the minor errors which, from time to time, might be expected to creep into their work. As to distance, it is always the horizontal distance which is given, and yet frequently the objects are not upon the same level. Often the slope distance is estimated, the angle determined, and the horizontal then calculated. When the tape is used to measure, in the hurry of the work it is sometimes misread. Lines which are reported to have been run are not always actually run; and it is not necessary that they should be.

It is a part of local history that, twenty-five or thirty years ago, measurements were made entirely with a surveyor's chain, 66 feet long. Measuring upon the slope of the mountains, the surveyor's assistants, with this chain, would take a series of horizontals, which they would determine by holding the chain, as nearly as they could estimate, in a horizontal position. They would sometimes note down upon a piece of paper, and sometimes carry mentally, the number of horizontals they had taken between the two points they were measuring. This crude method, of course, left, as it often was, to wholly unpractical chainmen, seldom, if ever, resulted in reporting distances accurately. Every variation from an absolute horizontal was a source of error, and very often the chainmen in a rough country were required to "break chain" —that is, use less than 66 feet. When the entire line had thus been measured between objects, it was no infrequent thing to err in reporting to the surveyor the number of horizontals taken. The greater the distance traversed, of course, the greater the likelihood of error. If each measurement was made without "breaking chain," then each horizontal would call for 66 feet. If a chainman reported to the surveyor a couple of horizontals more than he had taken, his report of a line 1500 feet in length would fall short of being correct by just *132* feet. It is not at all improbable that when the north side line of the *Nero* claim was chained along the south side line of the Boss, a couple of chain lengths were added above the number

of horizontals actually taken. The additional 3.5 feet would be easily accounted for by variations from the horizontal in holding the chain.

Take the case at bar. First the Boss claim had been surveyed for patent. The direction of its south side line had been determined. It was necessary actually to run it because it was not coincident with any other line previously surveyed; but when it became necessary to survey the Nero, it was found that the location of that claim gave it a north side line coincident with the Boss south side line. Naturally enough a surveyor would not spend an entire day running the north side line of the Nero claim. He would rely upon the Boss field notes for the course. Having established the corners of the Nero by monuments, he would survey the end lines to determine their course, and if well satisfied of the correctness and parallelism of his end lines, he would probably set down the south side line as of the same length, and upon the same course as the north side line. And so when a surveyor came to survey the Pirate King, if he found the location stakes upon the south side line of the Nero, then, without further ado, the course of the south side line of the Nero, as reported in its field notes, would be very apt to be given as the north side line of the Pirate King; and, again, if well satisfied that he had made the end lines of the Pirate King parallel, he might feel justified in omitting actually to run the south side line of the claim. It is not at all surprising that the patent course of the north side line of the Conkling claim, which the sur-

veyor says is along the southerly side line of the Pirate King, is not *strictly* correct according to the monuments found upon the ground. The accurate survey, however, made by Mr. Brooks, after this suit had been brought, of the north side line of the Conkling and the south side line of the Pirate King, as determined by the admittedly correct monument at the northeasterly corner of the Conkling claim, and the southwest corner of the Pirate King as found upon the ground and established from its northwest corner, proves a difference in course of a little more than *one-half of one degree,* from the course given in the two patents referred to. Such differences are merely negligible. It is common knowledge that the course of lines in patent surveys is not found to be ordinarily as accurate as courses given in surveys made by engineers for the purposes of litigation, where their work is commonly checked by surveyors in the employ of the opposing litigant. Indeed, two surveyors seldom give exactly the same course between a tree and a post, for each is almost certain to sight upon different portions of the objects. Where great accuracy is sought, of course, as in litigation surveys, a nail is placed in the respective objects.

What can be depended upon with entire accuracy, we submit, however, in patent surveys, is the location of the bearing trees themselves. These are permanent objects. Their positions cannot be mistaken. When we correlate the evidence furnished by the bearing trees, and the post found at the northwest corner of the Pirate King, with the evidence furnishel by the bearing tree (the balsam) at its southwest corner, and the mound of stones, and the

post found there, we submit that there is no reasonable doubt remaining of the true position of the northwest corner of the Conkling claim, which is indisputably identical with the southwest corner (post 3) of the Pirate King claim.

We think it unnecesasry to add any discusison of the evidence bearing on the position of the southwest corner of the Conkling claim. It is conceded that if the northwest corner, post 3, be properly located, that the southwest corner must be placed substantially in the position shown by petitioner upon its map Exhibit B.

It is a fact, the significance of which cannot be denied, that Mr. Brooks, when making a survey of the Twentieth Century claim, in August, 1901, found a stake in a mound of stones scribed in the manner described in the field notes for post 4, southwest corner of the Conkling claim. This post was standing in a mound of stones, and was taken by Mr. Brooks to be the southwest corner of the claim. He established at the same point the northwest corner of the Twentieth Century. Some time later, Mr. Robert Gorlinski, wishing to find the northwest corner of the Conkling claim, ran a careful transit line from the point where Mr. Brooks had found the southwest corner of the Conkling, and established the northwest corner of the Twentieth Century, as stated, and by running this line upon the course called for in the Conkling patent, Mr. Gorlinski came to the common corner marking the southwest corner of the Pirate King and the northwest corner of the Conkling, and there found the posts of those claims, the Pirate King still standing in its mound of

stones, and the old post marked for the northwest corner of the Conkling lying down in the mound of stones.

Seeking to verify the evidence thus afforded as to the position of the northwest corner of the Conkling, Mr. Gorlinski found the bearing trees to that corner referred to in the Conkling field notes, which he had with him at the time. He took the course and distance from the Pirate King post to the balsam tree, and found it to be south 40 deg. 10 min. west 26.5 feet. He said:

> "I did not take the bearing of the tree itself, but look the average of the blaze. That was marked for the two claims, U. S. Lot 580, and U. S. Lot 689. It was marked for both Pirate King and Conkling." (Pr. Tr. Rec. No. 3977, p. 93.)

Counsel refer to the testimony of Mr. Gorlinski to the effect that he did not find the southwest corner of the Conkling at the place at which Mr. Brooks found it when he, Mr. Gorlinski, was in that neighborhood making observations for posts in 1899, 1900 and 1901. By reference to the third paragraph of Mr. Gorlinski's testimony in the printed record (p. 92), it will be observed that he stated that he actually went to the point referred to as the "southwest corner of the Conkling, 689," *the first time,* in the fall of 1901, and that there was then snow upon the ground. He states that he did not then find post 4 of the Conkling, but evidently gives as the reason the presence of snow. Mr. Gorlinski is here referring to the identical point in controversy. In his cross-examination, he only said that he had been over this ground in 1901 and

1899, and had made observations for posts. He does not state what the occasion of his visit was at that time, nor whether he was looking particularly for the Conkling post, nor whether at that time there was snow upon the ground. Furthermore, all he says is that he was over "this ground."

In his direct examination, he referred to the very place in question, but the time of his visit to the very place in question was not *before* Mr. Brooks found the southwest corner of the Conkling, which was on the 27th of August, 1901, but *afterwards,* in the fall of that year.

We confess our inability to see any point in our opponent's quoting the testimony of Mr. Brooks to the effect that *when sent out by an employer to survey a claim,* he would put a post in at a corner if he found the original post had been removed. Mr. Brooks also testified, we admit, that surveyors to his knowledge, *in surveying a claim,* have been known to put in posts where they estimated the corners to have been, and that sometimes they will mark such posts as the originals were marked. Mr. Brooks says he has done such a thing himself, *when he believed he was at the correct point.* Direct and indirect reference is occasionally made to this testimony by respondent's counsel, and the conclusion is attempted to be deduced as reasonable that posts Nos. 3 and 4 of the Conkling, and post 3 of the Pirate King, and other posts referred to in the testimony (those marking the westerly end line of the Nero, for example) are found in the positions shown by the testimony, not because they were

placed there at the time of the official surveys, but because some later surveyor, under circumstances mentioned by Mr. Brooks, estimated these points to be the true position of the respective corners, and erected and marked the posts accordingly. But this is pure conjecture. There is not a scintilla of evidence in the case that any one of the posts in question was ever moved from its original position. While it is true that, taking the length of the Nero, Pirate King and Conkling, as given in their respective patents, we might expect to find the westerly corners, marking the westerly end lines of these claims, something like 135 feet farther westerly than the monuments which the testimony shows were actually found upon the ground, still the admitted fact in the case is that no post or monument was ever found except in the positions shown by petitioner's evidence. All three of these claims, as determined by the posts erected and the bearing trees marked, fall short approximately the same distance of the length of the patent calls for their side lines. It is quite evident, we submit, that the author of the original error in distance was Mr. Joseph Gorlinski, who surveyed the Nero.

When Mr. Jessen came to survey the Pirate King, he, no doubt, had in his possession the field notes of the Nero, and, taking it to be a claim 1500 feet in length, and having established the northeast corner of the Pirate King at the southeast corner of the Nero (which is an admitted fact in the case), and desiring to lay out the Pirate King as 1500 feet in length, and finding its northwest corner location stake, as we must suppose, approximately

near a monument and post marking the southwest corner of the Nero, he established there the northwest corner of the Pirate King. He would very naturally omit, under these circumstances, to chain the north side line of the Pirate King. Both for course and distance he would rely upon the monuments which he found marking the south side line of the Nero.

Our friends will admit this statement; but they insist that the Nero was 1500 feet in length. But they have produced no evidence whatever that 1500 feet is the true length of the claim. They rely exclusively upon the call in the patent. We have already shown, however, that whenever Mr. Jessen did rely upon in fixing the northwest corner of the Pirate King, he identified its position by marking at that corner two bearing trees which are found to this day properly marked, as described in Mr. Jessen's field notes, and one of them at such a short distance from the corner that there can be no question about the northwest corner of the claim. The Pirate King north side line indisputably never was 1500 feet in length. The end lines of that claim admittedly are, as required by the law, parallel, so that the south side line of the Pirate King is, of geometrical necessity, of the same length as the north side line. Now, when he came to survey the Conkling, his call for the north side line, beginning at post No. 2 of the Conkling, requires us to run along the south side line of the Pirate King until we reach the southwest corner of that claim, and there to stop at post No. 3.

Notwithstanding it is a repetition, we quote again from the Conkling field notes:

> "Thence S. 60 deg. 45 min. W. along southeasterly side line of Lot 580, Pirate King lode, and northwesterly side line of this claim, 1500 feet (to) P. 3 of L. 580, Pirate King lode, and northwesterly corner of this claim."
>
> (Exhibit O, Pr. Rec. 3977, Conkling field notes.)

Mr. Jessen, supposing the Pirate claim to be 1500 feet in length, naturally gives this length to the Conkling after establishing its northeasterly and northwesterly corners as identical with the southeasterly and southwesterly corners of the Pirate King.

Our adversary's brief rings with phrases extolling the sanctity of a United States patent. If it were admitted it is equal to any judgment of any court, importing the highest verity, *one patent imports as much verity as another.* The petitioner is equally claiming under a patent of the United States, and it is claiming only ground embraced within that patent.

The strong language cited from 111 Federal on pages 104-5 of our opponent's brief is not less applicable to the patent for the Custer No. 2 and Silver Hill No. 4, than to the patent for the Conkling claim. Admitting that patents "are generally prepared with deliberation, written with care, and made for the express purpose of solemnly recording the established rights, titles and interests of those whom they concern; that patents issued by the government, after surveys of the land and examinations of the rights of the grantees and of the nation, are but-

tressed by a presumption of exactness peculiarly strong; that every step in their preparation is required to be performed by disinterested officials in accordance with express provisions of statutes; that they are issued by the United States to evidence the nature and extent of its grants, and they bear its official seal; that they evidence the decisions of a quasi-judicial tribunal—the Interior Department of the Government—upon the rights of all parties to the land or privileges which they describe * * *"; *all this language is applicable to petitioner's patent.* Although subsequent in date to that granted to the respondent, it does, in terms, *both by its calls and the monuments erected upon the ground,* include the strip of land in controversy, and relates back to the time of the location of the claims granted. All that is amiss is that the Government had, prior to its issuance, granted a patent to the Conkling claim, which it is asserted by its calls, *and which by its calls alone,* embraces the ground in controversy. The learned Court of Appeals in its opinion in this case says:

> "The Department adjudged and conveyed to the patentee the tract 'bounded, described and platted as follows," and then set forth a boundary by course and distance carefully describing the two posts at the east end of the claim mentioned in the field notes, and as carefully disregarding and omitting all reference to the two posts at the west end of the claim mentioned in the field notes, and adjudging the second course to be * * * 'west 1500 feet to corner No. 3.'"

If we may assume the Department acts consistently, why, with all its records before it, if it so carefully disregarded and omitted "all reference to the two posts at the west end of the claim," with the purpose of granting to the grantee in the Conkling patent a claim 1500 feet in length, regardless of the monuments, did the Department, when later it came to grant a patent to the "Custer No. 2" and "Silver Hill No. 4" claims, so carefully disregard and omit all reference to the assumed west end line of the Conkling claim claim *as established by its patent calls*, and so carefully and deliberately extend the "Custer No. 2" and "Silver Hill No. 4" claims clear easterly to the westerly end line of the Conkling claim as determined by posts 3 and 4 as they were found actually located upon the ground?

The conclusion, we respectfully submit, that the Department ever intended to ignore the monuments on the Conkling claim is without the support of anything in the evidence in this case, and contrary to the natural inferences arising from all the circumstances, without adverting to the *law* at all.

The rules of the Commissioner of the General Land Office, providing for the marking of the official corners of the claim and the tying of them to adjacent bearing trees, utterly forbid the assumption that when those rules have been complied with and the field notes returned to the office show such compliance, the Department then describes the claim in the patent with the deliberate intention of making a grant which shall be bounded by lines which shall govern the boundaries of the claim irrespec-

tive of the monuments. What had occurred in the interval between the dates of the two patents in controversy that induced the Department to ignore the boundary of the Conkling claim which it had so deliberately established in opposition to the monuments upon the ground, and give to the grantee in Custer No. 2 and Silver Hill No. 4 patent, all that portion of the Conkling (sic.) lying *westerly* of its posts 3 and 4? Perhaps counsel will answer that what had happened was the passage of the law of April, 1904, giving controlling effect to monuments. We will not quarrel with the answer

In order to ascertain the intentions of a party who has made two conveyances, each of which it is claimed conflicts with the other, we ought, if possible, to harmonize the language the language of the respective conveyances so as to avoid such conflict. Nothing is easier than to harmonize the language of the two patents in question, and thus impute to the grantor in each a consistent intention. Clearly by the call for "corner No. 3" and "corner No. 4" in the Conkling patent, in view of the rules of the Land Department and of the positive requirements of statute that corners should be marked by permanent monuments and, if practicable, tied to adjacent bearing trees, it was intended that the line should stop at the post or monument erected to mark the corner; and this purpose is confirmed and made clear, we insist, by the action of the Department in extending the boundaries of the Custer No. 2 and Silver Hill No. 4 claims by the patent thereto to these Conkling monuments. We do not believe that the Department, in grant-

ing the Custer No. 2—Silver Hill No. 4 patent, carefully or otherwise intentionally disregarded the westerly end line of the Conkling claim as it had intended to establish it in the Conkling patent; but, on the contrary, very carefully respected that westerly end line, and, therefore, excluded from the Custer No. 2—Silver Hill No. 4 patent all that portion of those claims which lies *easterly* of a line drawn through posts numbers 3 and 4 of the Conkling claim as found upon the ground.

We cannot believe that this court will give serious consideration to the claim that, in view of the language of the Conkling patent, the petitioner was debarred, by any rule of law, from proving, by any evidence competent to establish the fact, that the 135.5 foot strip was not included within the limits of the Conkling lode mining claim as defined by the monuments erected to mark its boundaries at the time of its official survey. To exclude such proof would be to deny that one who has made a valid location of a mining claim in accordance with the laws of the United States acquires any title or any rights which the Government, or subsequent locator of neighboring ground, is bound to respect.

As against the owner of a contiguous prior location, the citation of cases to the effect that the calls in a patent may not be controlled by the monuments erected to mark the official survey of the patented claim, when the patent contains no call for the monuments, seems to us vain and futile. It is apparent that the rule which obtains even in conveyances between private parties of lands which are not required by law to be monumented

and surveyed before they are conveyed (to the effect that courses and distances may not be made to yield to monuments not called for) does not prevent the owner of property contiguous to that described in the conveyance in question from introducing evidence to show that his property has not lawfully been included in the conveyance, however plainly by its terms the conveyance may embrace it. Whatever may be the rule between the Government of the United States and the grantee in the Conkling patent, we submit that the owners of the Custer No. 2 and the Silver Hill No. 4, not parties to the proceedings which eventuated in the Conkling patent, are not concluded by its terms, and may show by any competent evidence that the locators of those claims were never warned or notified as required by law that a patent was sought for the portion of those claims now in controversy.

Assuming that there is no rule of law that prevents the owner of a validly located mining claim from contradicting the calls in a patent to a contiguous mining claim, when that patent is asserted against him, if it is admitted that the unpatented mining claim was the prior location; we insist that it is equally true that the grantee in a subsequent patent may make the same proof, even if the location is subsequent to the contiguous patented lode mining claim. We insist that this follows because the government itself has a right to insist that the Land Department, which is, after all, but an agency of the government, is without jurisdiction to grant a patent to mineral lands of the United States until after a valid location has been made and the same has been officially surveyed and monu-

mented; and then may grant only what has thus been surveyed and monumented.

Kelly v. Graham, *supra.*

If, after the grant of such a patent, contiguous territory not embraced within the claim as monumented is located, and the statutory requirements complied with, and the ground is finally patented to such locator, he has the right to insist that his predecessor in interest, the government of the United States, is not concluded by the terms of the first patent, so far as it attempts to embrace ground not included within the official monuments. It is not necessary, however, to decided that question in this case, because it is alleged in the bill of complaint that the entire 135.5-foot strip belonged to the predecessor in interest of the petitioner at the time of the location, the official survey of, and of the issuance of the patent for, the Conkling lode mining claim.

The burden of proof being upon the Conkling Mining Company to establish that the 135.5-foot strip was included in the Conkling *survey,* if it failed to show the original positions of the westerly corners of the claim, it failed to discharge the burden of proof which the law cast upon it as a condition to its right to a share of the ore extracted from the area of ground in question. It does not lie in the mouth of the Conkling Mining Company, we insist, to say that the original boundaries of the Conkling mining claim cannot be ascertained from the evidence in the case. Such a contention is but a confession that it failed to prove any right to any of the ore in the 135.5-

foot strip. This, we submit, clearly follows from the admitted facts that the 135.5-foot strip was, prior to the issuance of the Conkling patent, part of the Custer No. 2 and Silver Hill No. 4 claims, that those claims were patented upon such prior locations to the predecessor in interest of the defendant, and that said patent by its terms conveys to the grantee therein said 135.5-foot strip. The Conkling Mining Company may not have the strip carved out of said two senior locations notwithstanding the seniority of the Conkling patent, without proof that the boundaries of the Conkling claim, as surveyed, embraced the area in conflict; and if it be assumed that the proof leaves uncertain the original position of the westerly end line of the Conkling claim as surveyed for patent, then it is uncertain whether the 135.5-foot strip was ever included in the Conkling survey.

But, entirely aside from the question of burden of proof, we insist that the petitioner has clearly established that the 135.5-foot strip was not included within the official survey of the Conkling lode mining claim, and is properly a part of the Custer No. 2 and the Silver Hill No. 4, the senior locations, and is, therefore, the property of the petitioner, the Silver King Coalition Mines Company.

The record of the controversy strike us as unique. Without a scintilla of evidence that the Conkling patent vested in the Boss Mining Company, the grantee therein, any portion of the 135.5-foot strip in controversy, *except*

the calls in said patent, and without any other evidence that that strip is any part of the Conkling lode mining claim as surveyed for patent, the Conkling Mining Company has secured a judgment against the petitioner for a sum which now amounts, with interest, to more than six hundred thousand dollars. This judgment, so far as it rests upon the value of the ore extracted from the strip in controversy, is, according to the decision of the Court of Appeals, justified by the calls of the Conkling patent, *regardless of the official survey of that claim;* and that, in any event, the evidence leaves uncertain the position of the westerly corners of the claim as officially surveyed, and hence must be presumed that the Land Department intended to convey to the patentee a claim 1500 feet in length, although at the same time the respondent insists that there is not a word or syllable in the Conkling patent which points to the position of the monuments erected to mark its westerly end lines, and must admit that upon the hearing it introduced no evidence to maintain the issue upon its part, except this patent; so that, singular as it may seem, the Conkling Mining Company has, in effect, secured title to the strip in controversy and the right to three-fourths of the ore therein, after having deliberately admitted and in fact charged that this strip of ground was once the property of the predecessor in interest of the respondent company, without any effort to prove how or in what manner the Land Department of the Government ever acquired the authority to confiscate this strip

of ground and convey it to the predecessor in interest of the respondent; the position of our opponent being, very candidly, that the department, in the execution of the Conkling patent, intended to *ignore the patent survey for that claim and the monuments erected to mark the boundaries thereof,* and to embrace in the Conkling patent the entire strip of ground in controversy, regardless of the monuments, and without regard to the rights, if any, of the admittedly senior Custer No. 2 and Silver Hill No. 4 claims. And the respondent is bold enough to claim that the strip is controversy, although once a part of the senior locations, is lost and gone forever solely as a result of the calls of the Conkling patent, and that it is not charged with the burden of proving that at the date of the issuance of the patent it had any right to receive a conveyance of the ground in controversy; that it is sufficient that it did receive a conveyance which purports to embrace it, and that this conveyance completely forecloses petitioner of the right to claim any interest in the ground in controversy (except as the owner of a fourth interest in the Conkling claim) notwithstanding its admitted prior rights to the strip in controversy by virtue of its ownership of the adjoining senior locations. If these views of our adversary are correct, then we insist that it follows that the title acquired by the discovery of mineral in the mineral lands of the United States, and the location thereof in the manner required by law, and the performance of annual labor thereon, or even the expenditure of a king's ranson

in the development of the location in the search for the precious metals, is not worth the paper upon which the location notice is written.

Respondent must maintain in this Honorable Court its contention that the patent calls precluded the reception of any evidence of the location of the westerly corners of the Conkling as surveyed for patent, or submit, we insist, to a reversal of the judgment as to all the ore taken from the 135.5-foot strip. The actual position of the westerly end line of the Conkling claim 1364.5 feet westerly of its easterly corners is upon the evidence free from even reasonable doubt; and the injustice of the decree against petitioner is manifest.

Some portion of the ore for which the petitioner has been compelled to account was taken from within the admitted boundaries of the Conkling mining claim immediately east of the strip in controversy. That ore the petitioner claimed the right to take by virtue of its ownership of the Crescent fissure vein, and that right was upheld by the learned chancellor before whom the title to the ore bodies in controversy was tried. We are content, without further written argument, to submit the correctness of that decision upon the arguments contained in our brief filed in support of the application for the writ, and will submit also, in like manner, all questions pertaining to the accounting had before Hon. Tillman D. Johnson. Johnson.

In complete confidence in the impregnability of petitioner's title to the ore bodies in dispute both by virtue

of its ownership of the vein and its title to the area of ground in controversy, all the foregoing is

Most respectfully submitted,

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